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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

NO. 76-1826

ROBERT R. LONDON,
RUFUS JONES,
JULIUS COTTMAN

Petitioners

v.

UNITED STATES OF AMERICA

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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INDEX

TABLE OF CONTENTS

Opinions Below 1

Jurisdiction 2

Questions Presented 2

Constitutional Provision Involved 2

Statutory Provisions Involved 3

Statement of the Case 5

Statement of Facts 6

Introduction 8

Reasons for Granting the Writ 9

Conclusion 32

Appendix A
Opinion of the United States Court of Appeals for the Fourth Circuit A.1

Appendix B
Facts and Circumstances of Special Agent John D. Huntley, Jr., excised from the affidavit A.28

Appendix C
Excerpt taken from the Honorable C. Stanley Blair's memorandum and order denying Petitioners' Motion for Judgment of Acquittal or in the alternative Motion for New Trial..... A.38

Appendix D
Excerpt taken from the Government's Answer to Petitioners' Motion for Judgment of Acquittal or in the alternative Motion for New Trial A.39

TABLE OF CITATIONS

Cases

Page

Berger v. New York, 388 U.S. 41 (1967) 10

Jackson v. United States, 419 U.S. 1020 (1974) 12

Katz v. United States, 389 U.S. 347 (1967) 10

Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966) 25

Scott v. United States, 96 S. Ct. 1519 (1976) 9,10,15,21

United States v. Bernstein, 509 F.2d 996, 1001-02 29

United States v. Bynum, 360 F. Supp. 400, 408 18,19,20,22,30

United States v. Ceraso, 467 F.2d 647 (3rd Cir. 1972)..... 10

United States v. Donovan, 17 Crim.L. Rptr. 2029 29

United States v. Focarile, 340 F. Supp. 1033, 1046-47 10,24

United States v. Giordano, 469 F.2d 522 (4th Cir. 1972)..... 10

United States v. Giordano, 416 U.S. 505 (1974) 25, 29

United States v. James, 494 F.2d 1007, 1018 ..... 12, 17

United States v. King, 335 F. Supp. 523, 543 (S.D. Calif.)..... 16, 21, 24, 25, 26

United States v. Leta, 332 F. Supp. 1357, 1360 N.Y. (M.D. PENN. 1971) 10, 11, 27

United States v. Scott, 504 F.2d 194, 197 (D.D.C. 1974)..... 11

United States v. Scott, 331 F.Supp. 233 (D.D.C. 1971) 28

United States v. Tortello, 480 F.2d 764, 784 (2nd Cir. 1973) 10, 23

MISCELLANEOUS

Merriam-Webster New International Dictionary (2d Ed. 1948) 18, 31

S. Rep No. 1097, 90th Cong., 2d Sess. 101 U.S. Code Cong. and Admin. News 1968, 2190 (1968) 11

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Petitioners, Robert R. London, Rufus Jones and Julius Cottman, pray that a Writ of Certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fourth Circuit filed in the above entitled case on May 25, 1977.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is a reported

percuriam decision and appears at Appendix A to this Petition, infra pp. A.1 - A. 27. A portion of the opinion of the Honorable C. Stanley Blair denying Petitioners' Motion for Judgment of Acquittal or Motion for New Trial is found at Appendix C to this Petition, infra pp. A. 38.

JURISDICTION

The judgment of the United States Court of Appeals sought to be reviewed was filed on May 25, 1977. The jurisdiction of this Court is invoked under 28 U.S.C.

QUESTIONS PRESENTED

1. Did the Government's deliberate failure to limit the number of unauthorized interceptions coupled with its failure to demonstrate that this course of action was its only practical option constitute substantial noncompliance with the minimization provision?

2. Does substantial noncompliance with the minimization provision mandate total suppression of the evidence?

3. Did the Government's deliberate non-compliance with the recording provision mandate total suppression of the evidence?

CONSTITUTIONAL PROVISIONS INVOLVED

This case and the issue presented involves the Fourth Amendment to the Constitution of the United States which provides:

"The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATUTORY PROVISIONS INVOLVED

This case and the issue presented involves the statutory provisions of Title 18 U.S.C. Section 2518 (5) and Title 18 U.S.C. Section 2518 (8) (a):

"§ 2518 (5)

(5) No order entered under this section may authorize or approve the interception of any wire or oral communication for any period longer than is necessary to achieve the objective of the authorization, nor in any event longer than thirty days. Extensions of an order may be granted, but only upon application for an extension made in accordance with subsection (1) of this section and the court making the findings required by subsection (3) of this section. The period of extension shall be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted and in no event for longer than thirty days. Every order and extension thereof shall contain a provision that the authorization to intercept

shall be executed as soon as practicable, shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, and must terminate upon attainment of the authorized objective, or in any event in thirty days."

"§ 2518 (8) (a)

(8) (a) The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations. Immediately upon the expiration of the period of the order, or extensions thereof, such recordings shall be made available to the judge issuing such order and sealed under his directions. Custody of the recordings shall be wherever the judge orders. They shall not be destroyed except upon an order of the issuing or denying judge and in any event shall be kept for ten years. Duplicate recordings may be made for use or disclosure pursuant to the provisions of subsections (1) and (2) of section 2517 of this chapter for investigations. The presence of the seal provided for by this subsection, or a satisfactory explanation for the absence

thereof, shall be a prerequisite for the use or disclosure of the contents of any wire or oral communication or evidence derived therefrom under subsection (3) of section 2517."

STATEMENT OF THE CASE

On February 5, 1975, the Grand Jury for the United States District Court for the District of Maryland handed up an indictment charging among others, the Petitioners, Robert Reuben London, Julius Cottman and Rufus Jones with having violated Title 18, United States Code section 1955 (Conducting an illegal gambling business).

The trial of the London, Jones and Cottman commenced on December 1, 1975 before the Honorable C. Stanley Blair with the aid of a jury. On December 17, 1975, the jury returned verdicts of "guilty" as to all defendants.

Subsequent to the entry of the jury's verdict, Motions for New Trial were filed on behalf of the Petitioners, London, Cottman and Jones and same were heard and denied on February 20, 1976.

Thereafter, on March 19, 1976, the Petitioner London was sentenced to the custody of the Attorney General or his authorized representative for imprisonment for a period of five (5) years. The Petitioner Cottman was sentenced to the custody

of the Attorney General or his authorized representative for a period of four (4) years and, the Petitioner Jones was sentenced to the custody of the Attorney General or his authorized representative for a period of three (3) years.

It is from their respective convictions and sentences that the Petitioners herein noted their Appeal to The United States Court of Appeals for the Fourth Circuit on April 19, 1976. Their convictions having been affirmed, it is from that decision the Petitioners note their timely request to this Honorable Court.

STATEMENT OF FACTS

The instant case was called for trial before the Honorable C. Stanley Blair with the aid of a jury on December 1, 1975. At that time, Petitioners, Robert R. London, Julius Cottman and Rufus Jones, entered pleas of not guilty and requested that the issues of their respective guilt or innocence in the matter be submitted to trial before a jury. Each was ultimately found guilty of the charges contained in the instant indictment charging violations of Title 18, U.S.C., § 1955.

The Government, in presenting its case against the Petitioners, London, Cottman and Jones called to testify sixteen Special Agents of The Federal Bureau of Investigation. The testimonies of the Government witnesses were primarily designed to speak of their respective surveillances and investigations of an alleged

illegal gambling business which was to have existed primarily within the offices of the Aldon Bonding Company located at 1202 North Charles Street, Baltimore, Maryland. The aforementioned investigation was to have commenced on or about March 27, 1974, and was to have continued under the direction of Special Agent John D. Huntley until shortly before the instant indictment was handed up by the Grand Jury for the United States District Court for the District of Maryland in February of 1975.

The Government's first witness was Special Agent Marion M. Wright. Agent Wright testified that his primary responsibility in this matter was "the coordination and installation and repair of certain technical equipment". According to Agent Wright, on August 23, 1974, two microphones with miniature amplifiers were installed at his direction under the auspices of a Court Order at the premises known as 1202 North Charles Street, Baltimore, Maryland. Agent Wright also testified that he supervised the activation of a pen register device at 1028 Irwin Drive, Joppatown, Maryland, on July 30, 1974, and the installation of a wire tap with a Court Order at that same address.

The Government's next witness was the Case Agent, John D. Huntley. Agent Huntley related that, in accordance with the Court Ordered monitoring of 1202 North Charles Street, monitoring at that address was not to commence and, in fact did not commence until one of the named principals, Robert London, Richard Genco or Albert Isella

were determined to be present within that premises. Huntley testified that only conversations pertaining to alleged gambling activity were recorded. On cross examination, he emphasized that although every conversation occurring within that premises was monitored provided one of the three named individuals were therein present (London, Genco or Isella), only those pertaining to alleged gambling violations were recorded. In fact, except for one conversation, there was a constant monitoring of all conversations occurring within 1202 North Charles Street provided one of the three principals was present. According to Huntley, the entire period of monitoring at 1202 North Charles Street covered a period from August 24, 1974 through September 12, 1974.

INTRODUCTION

Petitioners, Robert R. London, Rufus Jones and Julius Cottman were convicted of violations of 18 U.S.C. § 1955 (1970), conducting an illegal gambling business. The evidence adduced against them at trial consisted largely of tapes of conversations that the Government had intercepted through the use of electronic eavesdropping equipment. Petitioners contend that this evidence was illegally obtained during the investigation and improperly admitted at trial. In particular, Petitioners contend, the Government failed to fulfill the minimization provision of Title III, 18 U.S.C. § 2518 (1970) by: (1) deliberately not attempting to limit the number of nonpertinent conversations intercepted,

and (2) deliberately intercepting other conversations not authorized by the Act, namely non-recorded conversations. What is more, the Government failed to comply with the recording provision of Title III, 18 U.S.C. § 2518 8(a) by deliberately not recording eighty percent of the communications seized. This has resulted in a shamefully incomplete record of the agents' conduct in the investigation and has materially and adversely affected both the reviewal function of the judiciary and the ability of the Petitioners to defend themselves. For these reasons, Petitioners further contend, total suppression of all the fruits of the Title III investigation is mandated.

REASONS FOR GRANTING THE WRIT

1. The Government's deliberate failure to limit the number of unauthorized interceptions coupled with its failure to demonstrate that this course of action was its only practical option constitutes substantial noncompliance with the minimization provision.

The minimization requirement of 18 U.S.C. § 2518 (5) (1970) has been termed a "core provision" of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. See Scott v. United States, denying cert. in 96 S. Ct. 1519 (1976) (Brennan, J. dissenting). The minimization provision, which requires that electronic surveillance shall be " . . . conducted in such a way as to minimize the interception of communications not otherwise

subject to interception under this chapter . . .", 18 U.S.C. § 2518 (5) (1970), "constitutes the congressionally designed bullwark against conduct of authorized electronic surveillance in a manner that violates the constitutional guidelines announced in Berger v. New York, 388 U.S. 41 (1967) and Katz v. United States, 389 U.S. 347 (1967)." Scott, supra, at 1519.

Despite the importance of the constitutional rights protected by the minimization requirement, it is clear that even proper minimization procedures rarely, if ever, result in the interception of only pertinent conversations. To "minimize" is to reduce to the lowest level possible and "possible" in this context has been defined as meaning "feasible" or "reasonable." United States v. Focarile, 340 F. Supp. 1033, 1046-47 (D. Md. 1972), aff'd sub nom. United States v. Giordano, 469 F. 2d 522 (4th Cir. 1972), aff'd, 416 U.S. 505 (1974). Under some circumstances, interception of one hundred percent of conversations within a given period of time has been held reasonable. See United States v. Leta, 332 F.Supp. 1357, 1360 N.Y. (M.D. Penn. 1971) rev'd on other grounds sub nom. United States v. Ceraso, 467 F. 2d 647 (3rd Cir. 1972).

The minimization requirement of 18 U.S.C. § 2518 (5) (1970) has been held satisfied if the reviewing court finds that, in the light of all the facts and circumstances of the case, "the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." United States v. Tortello, 480 F. 2d 764, 784 (2nd Cir. 1973),

cert. denied, 414 U.S. 866 (1973). The determination of the reasonableness of the agents' behavior requires a case-by-case analysis of the minimization procedures adopted. See S. Rep. No. 1097, 90th Cong., 2d Sess. 101, U.S. Code Cong. & Admin. News 1968, 2190 (1968). Thus, interception of n% of conversations may or may not represent an unreasonable intrusion, depending on the particular circumstances of the case. See Leta, supra, 332 F. Supp. at 1360 n. 4.

It must be emphasized, however, that a case-by-case determination is not the same as an item-by-item analysis. An investigation of the reasonableness of a pattern of behavior seems to demand an examination of all the circumstances. Thus,

> An inquiry into possible noncompliance with the minimization requirement is, by its very nature, one that calls for an examination of the totality of the monitoring agents' conduct during the duration of the authorized interception. Fragmenting the minimization inquiry . . . would force the court to adopt an unrealistically narrow view of the issue, thus making any assessment of the overall reasonableness of the agents' conduct a highly artificial exercise. United States v. Scott, 504 F. 2d 194, 197 (D. D. C. 1974), rev'd on other grounds, 516 F. 2d 751 (D. D. C. 1975), cert. denied, 96 S. Ct. 1519 (1976).

All Title III investigations are subject to the minimization provision. Although some cases speak of certain situations as not allowing for minimization, see, e.g., Scott, supra, 516 F.2d at 758, the statute requires minimization of all unauthorized interceptions. 18 U.S.C. § 2518 (5) (1970). Since minimization means "reduction to the lowest level possible," perhaps these cases meant to say that, under certain circumstances, no reduction can be made. The briefest reflection, however, should reveal the distinction between a good faith attempt to reduce the number of interceptions, which, because of the nature of the investigation, results in no change in the number of communications actually seized, and a course of action involving no attempt to minimize, which, of course, yields the same result.

The intent of the investigating officers has been identified as one of the factors to be weighed in determining whether minimization has taken place. See, e.g., United States v. James, 494 F.2d 1007, 1018 (D.D.C. 1974), cert. denied sub nom. Jackson v. United States, 419 U.S. 1020 (1974). Although it has also been held that, in those situations where minimization procedures would have effected no decrease in the number of conversations intercepted, the agents' intent not to minimize is irrelevant, see Scott, supra, 516 F. 2d at 756, this position has been severely critized. See United States v. Scott denying rehearing in 522 F.2d 1333, 1334 (D.D.C. 1975) (Robinson, J., dissenting). But the question need not be resolved here, for there has been no showing that proper minimization techniques would

not have resulted in the interception of fewer conversations. In fact, the circumstances of this case reveal a number of cogent reasons why minimization procedures would have reduced the number of interceptions.

First, it must be borne in mind that this case involved electronic eavesdropping rather than the use of a telephone tap. Although both investigative methods are subject to the minimization requirement,

> with a telephone tap, communications are divided into discrete units which Government agents can appraise individually and if believed to be innocent, can cease intercepting. They can resume their interception activities with the activation of their equipment by the next telephone call. This segregation of communication does not exist with electronic eavesdropping [and in] this context Government agents must be given a broader scope for their interception. Appendix C, pp. A.38.

Conceding, arguendo, the validity of this proposition, the Government should have requested only, Judge Young should have approved only, and the agents should have utilized only a telephone tap. The affidavit itself establishes that, to the Government's knowledge, Petitioners and others engaged in illegal gambling activities over the telephone. See Appendix B, pp. A.30-A. 37. Surely the spirit, if not the letter, of

Title III prohibits the Government from first using investigative techniques more intrusive than reasonably necessary only later to blame the ineffectiveness of minimization procedures on the techniques themselves.

Second, the fact that it was a conspiracy under investigation did not relieve the Government from its duty to minimize. The statute requires minimization in all investigations. The nature of the conspiracy, and more importantly, the extent of the Government's knowledge of the conspiracy prior to the institution of electronic eavesdropping should affect the number of non-pertinent conversations the Government may properly intercept without violating the minimization provision. In this case, despite the Government's contention that:

> the purpose of the eavesdropping was not so much to incriminate the known person whose place of business was tapped as to learn the identity of the co-conspirators and to delineate both the contours and interior workings of the conspiracy.

it is clear from examination of the affidavit that the Government knew most of the interior workings of the alleged conspiracy before the electronic surveillance was instituted. See Appendix B, pp. A. 28-A. 37. What is more, the fact that the affidavit reveals that this information was gathered through conventional investigative techniques would seem to cast doubt

upon any possible Government contention that further information of this nature could only have been obtained through the use of extraordinary investigative means. See Appendix B, pp. A. 28-A. 37.

Third, the statutorily imposed system of judicial checks and balances on Title III investigations strongly implies that the Government bears the burden of demonstrating that minimization has been carried out. Even those cases which have held that the minimization provision had been complied with where there had been interception of all communications within a given time period were able to so hold only after thorough review of the interceptions demonstrated that the Government had had no practical alternative. See, e.g., Scott, supra, 516 F. 2d at 756-58. Here, the Government not only concedes the interception of virtually one hundred percent of communications, but is unable to demonstrate that this course was its only practical option. Moreover, the Government's inability to so demonstrate is directly attributable to its violation of the recording provision.

Finally, to the extent that this court accepts the proposition that deliberate non-recordation is tantamount to a failure to minimize, it follows that the Government agents had a simple minimization option open to them - turning on the tape recorder.

The Government has pointed in this case to four examples of what it calls minimization.

First, the Government has contended that the fact that communications were intercepted only when physical surveillance established that London or one of two other named parties were within the monitored premises at 1202 North Charles Street indicates an attempt to minimize. This contention must be evaluated in light of the fact that 1202 North Charles Street was the location of Mr. London's bail bonding business, and that there were few, if any, occasions when others were present while he was not. The Government's "minimization effort," at least in this regard, amounted to a policy of not listening to conversations only when no one was present. This can hardly be called minimization.

As a second example of its minimization attempts, the Government has pointed to its noninterception of a privileged conversation between Mr. London and his attorney. While Petitioners concede that the Government's action here was proper, it must be noted that this was the only communication during the entire investigation that was not intercepted.

> [D]espite the practical difficulties, Congress intended "minimization" under § 2518 (5) to involve something more than the mere provision for [not intercepting conversations protected by] the limited attorney-client privilege." United States v. King, 335 F. Supp. 523, 543 (S. D. Calif. 1971), modified, 478 F. 2d 494 (9th Cir. 1973), cert. denied, 417 U.S. 920 (1973).

As a third example, the Government has noted Judge Young's ongoing review of the investigation. Although it is generally true that where the judge who originally approved the eavesdropping order plays an active role in the effort to minimize, other courts passing on the issue of minimization in the same case will give considerable deference to the original judge's participation, see, e.g., James, supra, 494 F. 2d at 1021, the extent to which Judge Young actually participated in the minimization process here must be questioned. While Judge Young required and received progress reports from the investigating agents every five days during the course of the surveillance, there is no evidence that the judge was apprised of the fact that the agents were systematically not recording the majority of the interceptions.

Finally, the Government has contended that "in an attempt to minimize the invasion of privacy upon the [Petition], London, the Government did not record those conversation . . . which were deemed to be not connected with the gambling enterprise." Petitioners cheerfully concede that the Government did indeed not record those conversations "deemed" nonpertinent, but Petitioners submit that the Government's equation of nonrecordation with minimization is nothing short of prepostercus.

First of all, the statute requires that interceptions be minimized. The Government's

position, that nonrecordation is somehow equivalent to minimization, can withstand scrutiny only if interception can be equated with recording. "Intercept" is defined by the Act as "the aural acquisition of the contents of any wire or oral communication through the use of an electronic, mechanical, or other device." 18 U.S.C. § 2510 (4) (1970). This definition clearly equates "interception" with the listening to, monitoring, or hearing of the communication either at the time the communication takes place or at a later time with, for example, the use of a playback tape recorder. United States v. Bynum, 360 F. Supp. 400, 408 (S.D.N.Y. 1973), aff'd., 485 F.2d 490 (2d Cir. 1973), vacated and remanded, 417 U.S. 903 (1974). "To record," on the other hand, is defined as "to commit to writing, to printing to inscription, or the like." Merriam-Webster New International Dictionary (2d ed. 1948). The distinction between interception and recordation is confirmed by the statute itself;

> The contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. 18 U.S.C. § 2518 (8) (1970) (emphasis added).

In United States v. Bynum, supra, the court accepted the Government's proposition that the

recording of a communication that had not been heard by the Government did not constitute an interception under the terms of the Act. Bynum, supra, 360 F. Supp. at 408-09.[1] While Bynum has been criticized for seemingly giving the Government a license to record all communications, criticism has centered on the possibility that Government agents could later surreptitiously listen to previously recorded communications that, even at the time of recording, were clearly nonpertinent. See, e.g., Note, 26 Stan. L.R. 1411, 1415-17 (1974). Even those commentators critical of Bynum seem to accept the proposition that improper listening is the evil to be avoided; they differ with Bynum only in their views of the best way to avoid it.

Since recording is not equivalent to interception, it is difficult to understand how the "minimization" of recording can be construed as the minimization of interceptions. "The 'evil' to be limited by the minimization requirement is the listening to innocent calls". Bynum, supra, at 409 (emphasis added).

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1. Bynum was a wiretap case in which all calls were recorded but only pertinent calls were monitored. Assistant United States Attorney Charles B. Updike testified at a pretrial hearing concerning the rationale behind complete recordation:

> We were concerned that there should be a full record with respect to all calls for two fundamental reasons. One was the protection of any innocent parties involved in the interception and the other was a preservation of

Listening to innocent calls is evil in the sense that it constitutes an invasion of privacy. Recording, on the other hand, serves to protect a defendant's rights by allowing the court to evaluate the totality of the agents' behavior through analysis of the recordings themselves. Since the only protection a defendant has against the violation of his constitutional rights by the seizure of a particular communication lies in the recording of that communication, to say that communication x should not have been recorded is to say all the more forcefully that communication x should not have been intercepted. This principle should be borne in mind in evaluating Judge Blair's finding that

> There was no way the agents in this case could have fulfilled the mandate of the [order] without fairly continuous monitoring. Necessarily they were privy to innocent conversations. To have indiscriminately recorded all of these would have been an unwarranted invasion of the [Petitioners'] lawful activity. See Appendix C, pp. A. 38. (emphasis added).

And, of course, it should go without saying that "indiscriminate" recording of interceptions is

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1. (continued)

the calls themselves so that there could be no accusations at a later time that the Government had made selective recordings in the conduct of this investigation. Bynum, supra, 360 F. Supp. at 411.

exactly what is required by the statue. See 18 U.S.C. § 2518 (8) (a) (1970).

The Department of Justice also seems to believe that overhearing constitutes an interception. The wiretap instruction manual which the Department distributes to attorneys who supervise wire taps states: "The desirability of recording the intercepted communication is obvious. Since evidence of the intercepted conversation would be admissible in future trials it is preferable to produce the verbatim recording rather than relying solely on the memory of the agent who overheard the conversation. See U.S. Dept. of Justice, Manual for Conduct of Electronic Surveillance, 28 (1970).

Although the Government agents did not testify concerning the contents of the unrecorded interceptions, this does not mean that the Petitioners were not prejudiced by the Government's failure to record the greater part of the intercepted communications. The fact that the monitoring of a particular communication ultimately yields a segment of incriminating conversation, does not, of course vindicate the interception. See King, supra, 335 F. Supp. at 541-42. Defendants must be allowed to argue that the Government should not have been listening to the conversation in the first place, and so should never have heard the incriminating portion. 18 U.S.C. § 2518 (8) (d) (1970) seems to clearly indicate the intention of Congress that the recordings themselves would be used by the defense. Since a failure to minimize must be determined ghrough an examination of the totality of the agents' behavior, see Scott,

supra, 504 F.2d at 197, selective recording frustrates this congressional intention by hampering defense efforts. And where, as here, the Government deliberately leaves the majority of interceptions unrecorded, Petitioners face and unreasonable burden in their attempt to demonstrate a failure to minimize.

The legislative hsitory of the recording provision merely paraphrases the statute and gives no clue to the framers' intent. But commentators have assumed that the probable purpose of this section was to prevent the situation in which Government agents overhear communications but fail to record them, leaving defendants no way to attack the agents' recollections at trial. See, e.g., Note, 26 Stan. L. R. 1411 (1974). Petitioners questioning the adequacy of minimization will usually be most concerned with the number, type, and duration of non-pertinent communications seized, yet these are the very communications the Government has chosen not to record. To judicially approve such tactics is to emasculate the minimization requirement and grant the Government a virtual license to listen to all conversations in the future.

Minimization procedures must usually be adopted by agents on an ad hoc basis to be reviewed by the court after the fact. Cf. Bynum, supra, at 407. Since judicial review thus forms an indispensible part of the minimization process, it is only commonsensical that a procedure that serves to obfuscate the court's inquiry into the

adequacy of minimization can hardly be minimization itself. The recording procedures adopted by the Government agents in this case have made proper review nearly impossible. Because such review is so important to the protection of the Petitioners' constitutional rights, the agents can hardly be said to have acted with "a high regard for the right of privacy," Tortello, supra, 480 F.2d at 784, and, therefore, highly selective recordation is, at least arguably, the logical equivalent of nonminimization per se.

The matter may be put another way. Since Title III states that all interceptions are to be recorded if possible, the interception of communications that could be recorded but are not is not authorized by the Act. Since the Act also states that unauthorized interceptions are to be minimized, the Government must keep the number of unrecorded interceptions to a minimum. Thus, for example, were the Government agents to discover that their recording equipment had ceased functioning, the agents would appear to be obliged to shut down their monitoring equipment until the recorder was repaired. The deliberate interception of deliberately nonrecorded communications would thus seem to be a direct violation of the minimization provision.

Although it is true that the vast majority of cases that have dealt with minimization have focused on the pertinency of communications seized, the statute requires that the interception of all

communications not authorized by the Act be kept to a minimum. Since the statute also requires that intercepted communications be recorded, a failure to limit the number of interceptions not recorded would seem, by the plain meaning of the statute, to be a proper subject for a minimization inquiry. Petitioners contend that minimization has been linked with pertinency for the sole reason that almost every Title III investigation yields a portion of non-pertinent interceptions, thus giving defense counsel an opportunity to claim failure to minimize. Selective recordation, on the other hand, has not been connected with minimization, but for a different reason. Since the Government usually records all interceptions as a matter of course, this issue has rarely, if ever, been litigated.

2. Substantial noncompliance with the minimization provision mandates total suppression of the evidence.

Once a court determines that the Government has failed to minimize unauthorized interceptions under a Title III investigation, the issue of the Petitioners remedy must be resolved. There is little authority in this area and the question has been termed "probably the most difficult this court has ever been asked to decide." King, supra, 335 F. Supp. at 543. Nevertheless, it is hoped that the following analysis, drawn in part from Judge Miller's insightful discussion of the issue in United States v. Focarile, 340 F. Supp. 1033 (D. Md. 1972), will be of some assistance.

A court faced with a defendant in a criminal proceeding who has been aggrieved by a Title III investigation conducted in noncompliance with the minimization provision has two basic alternatives: partial or total suppression of the evidence. Although 18 U.S.C. § 2520 (1970) allows an aggrieved party to maintain a civil suit against the investigating officers, such suits are notoriously ineffective as a remedy for those already injured by illegal police activity or as a deterrent against such activity in the future. See, e.g., Lankford v. Gelston, 364 F.2d 197 (4th Cir. 1966). Whether partial suppression is any more effective, either remedially or prophylactically, is questionable.

United States v. King, supra, 335 F. Supp. 523, is perhaps the leading case holding that a violation of the minimization provision demands only partial suppression of the evidence. This decision was reached largely through analogizing the "statutory exclusionary rule" of 18 U.S.C. § 2515 (1970) to the judicially imposed exclusionary rule used to suppress evidence obtained in violation of the fourth amendment. See King, supra, at 544. Because the exclusionary rule has traditionally been used to suppress all the fruits of a search and seizure only where the search has been so unreasonable as to violate the fourth amendment, Judge Nielsen held that the statutory violation in King required only partial suppression. The United States Supreme Court, in the recent case of United States v. Giordano, 416 U.S. 505 (1974), has repudiated the reasoning, if not the holding, in King by finding that statutory as well as constitutional violations may require total suppression of evidence under Title III.

> The words "unlawfully intercepted" are . . . not limited to constitutional violations, and we think Congress intended to require suppression where there is failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device. 416 U.S. at 527 (1974)

It must also be noted that while Judge Nielsen approved partial suppression in King, he provided a strong argument against such approach in the King opinion itself:

> [T]he limited system which Title III creates is designed to prevent unreasonable invasions of privacy, not to repair them, and . . . if those limitations are not voluntarily adhered to by the Government, total suppression may well prove to be the only feasible solution. King, supra, at 545.

U.S. v. Scott, 331 F. Supp. 233 (D.D.C. 1971), is the first case to hold that a failure to minimize requires total suppression. Although this opinion was vacated, remanded, and eventually reversed on the ground that Judge Waddy had used an improper standard in determining whether the

Government had indeed failed to minimize, the holding on the remedy issue was never overruled. In concluding that all interceptions should be suppressed because of the Government's failure to minimize, Judge Waddy said:

> If this court were to allow the Government agents to indiscriminately intercept every conversation . . . and to continue monitoring . . . when it becomes clear that [the conversations] are not related to the authorized objectives of the wiretap and in violation of the limiting provisions of the order such order would become meaningless verbiage and the protections to the right to privacy outlined in Berger and Katz would be illusory. 331 F. Supp. at 248.

In Focarile, Judge Miller drew upon the reasoning in United States v. Leta, supra, 332 F. Supp. 1357, in holding that the Government's failure to comply with the minimization provision required total suppression. Leta began with the premise that the seizure of items which had not been particularly described did not per se vitiate the entire search; the entire search is vitiated only if it is unreasonable. Leta went on to imply that, with regard to electronic surveillance, reasonableness has been congressionally determined by the standards of Title III. Thus, if electronic surveillance does not comport with the mandates of Title III, it becomes prima facie unreasonable. See 332 F. Supp. at 1360.

Judge Miller agreed with the result reached by Leta and Scott. His reasoning in doing so speaks for itself:

> The minimization requirement of Section 2518 (5) would be illusory if it were enforced on an item-by-item basis by means of suppressing unauthorized seizures at trial after the interception is a fait accompli. Minimization as required by the statute must be employed by the law enforcement officers during the surveillance, not by the court after the surveillance . . . While partial suppression under Rule 41 (c) F.R. Crim. P. may act as a sufficient prophylactic measure in the context of seizures of physical objects, the seizure of conversations differs so significantly as to warrant a stronger safeguard. Knowing that only "innocent" calls would be suppressed, the Government could intercept every conversation during the entire period of a wiretap with nothing to lose by doing so since it would use at the trial only those conversations which had definite incriminating value anyway, thereby completely ignoring the minimization mandate of Title III. A conversation once seized can never truly be given back as can a physical object. 340 F. Supp. at 1047.

3. The Government's deliberate noncompliance with the recording provision mandates total suppression of the evidence.

Finally, Petitioners contend that the Government's deliberate and willful violation of the recording provision, 18 U.S.C. § 2518 (8) (a) (1970), is, in itself, sufficient to mandate total suppression of the evidence. Total suppression has been sanctioned as the appropriate remedy not only for violations of the minimization provision but also for situations where inventory notice was not extended, see, e.g., United States v. Donovan, 17 Crim. L. Rptr. 2029 (S.D.N.Y. 1974), aff'd, 508 F.2d 837 (6th Cir. 1975), where the application order failed to identify a known offender whose communications were to be intercepted, see, e.g., United States v. Bernstein, 509 F.2d 996, 1001-02 (4th Cir. 1975); and where the Title III application had not been authorized by a proper party, see United States v. Giordano, 416 U.S. 505, 508 (1974).

Of course, not every violation of Title III results in an unlawful interception sufficient to mandate total suppression. As Judge Butzner noted in the recent case of United States v. Bernstein, 509 F.2d 996 (4th Cir. 1975):

> A violation is material only if Congress intended the statutory provision that was not followed to be a "precondition to obtaining . . . intercept authority." Statutory preconditions, teaches the court, "directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device." In contrast, violation of a statutory provision that does not "affect the fulfillment of any of the reviewing or approval functions required by Congress," does not render

> an interception unlawful within the meaning of § 2518 (10) (a) (i). Whether a statutory provision is a precondition to a valid order depends, then, on its role in the Act's system of restraints on electronic surveillance. 509 F. 2d at 999

The determination of whether there has been proper minimization as required by Title III is clearly within the purview of the court's reviewing function. In fact, since minimization procedures need not be set out in the interception order, see Note, 26 Stan. L.R. 1411, 1432 n. 107 and cases there cited (1974), minimization standards are more often reviewed by the court after the fact than they are approved or disapproved in advance. In evaluating minimization the totality of the interceptions must be examined and, of course, recordings of all the interceptions or transcriptions made therefrom form the proper point of inquiry, see United States v. Bynum, 475 F.2d 832, 837 (2d Cir. 1973). A failure to record any significant segment of the interceptions thus seriously and materially affects the fulfillment of the court's reviewing function. And a failure to record eighty percent of interceptions so fragmentizes the court's inquiry as to transform its assessment of the minimization question into a highly artificial exercise.

In Bynum, supra, 475 F.2d 832, the court remanded the case to the district court for evidentiary hearings on the issue of minimization.

The circuit court was itself unable to determine if the Government had complied with Title III minimization requirements since " . . . all conversations were recorded but only those presumably inculpatory were ever transcribed. The mischief lies in the interception obviously and what was not transcribed remains unknown." 475 F.2d at 832 (emphasis added). This court also finds its review hampered by an incomplete record, but, unlike the Bynum case, the record here must remain incomplete.

Furthermore, a record that is deliberately and selectively left incomplete is an edited record. 18 U.S.C. § 2518 (8) (a) (1970) requires, inter alia, that the recording "shall be done in such a way as will protect the recording from editing or other alteration." (emphasis added). Not only are recordings composed of bits and pieces of interceptions easier to edit than recordings of entire interceptions, see Bynum, supra, but selective recordation is itself tantamount to editing. To "edit" is to modify by excisions, curtailments or the like. Merriam-Webster New International Dictionary (2d Ed. 1948). Since to "curtail" is to reduce, Merriam-Webster New International Dictionary (2d Ed. 1948), the Government has in effect edited the tapes by reducing the number of interceptions recorded to twenty percent rather than one hundred percent as required by the statute.

Here, the Government's willful and deliberate nonrecordation of eighty percent of the total interceptions is a violation of the statute that has not only affected the court's reviewing function but

has made proper review nearly impossible. Petitioners submit that the blatant illegality of the Government's action in carrying out the interception order has rendered the entire interception procedure unlawful, and mandates total suppression of the evidence.

CONCLUSION

In concluding, Petitioners herein respectfully request that this Honorable Court grant their requested Writ of Certiorari for the reasons contained herein. It is also requested by Petitioners that this Honorable Court grant them leave to adopt herein and include as a basis for their request the Petition of Richard Genco, a co-petitioner to this cause. Mr. Genco and his attorney have agreed to allow Petitioners herein to adopt their Petition and Petitioners herein likewise have no objection to allowing Mr. Genco to adopt the basis of their request.

Respectfully submitted,

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Richard M. Karceski

Attorneys for Petitioners

APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 76-1664

United States of America — Appellee,

-v-

Julius Cottman — Appellant.

No. 76-1665

United States of America — Appellee,

-v-

Rufus Jones — Appellant.

No. 76-16666

United States of America — Appellee,

-v-

Robert R. London
a/k/a Fifi London — Appellant.

Appeals from the United States District Court for the District of Maryland, at Baltimore.
C. Stanley Blair, District Judge.

Argued January 10, 1977 Decided May 25, 1977

Before WINTER, CRAVEN* and BUTZNER, Circuit Judges.

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*Judge Craven died before preparation of this opinion. However, following argument, he expressed agreement with this result.

WINTER, Circuit Judge:

Defendants, together with others, were indicted by a federal grand jury on a charge of violating 18 U.S.C. § 1955 (conducting an illegal gambling business). Defendants London, Jones and Cottman were tried before a jury and found guilty of violating the statute. Defendants Genco, Himes, Shade and Clerkley were tried without a jury and also found guilty as charged. These appeals ensued. At trial, the various defendants moved to suppress all incriminating evidence secured

by wiretap. The district judge denied this motion, holding that the government fully complied with the terms of the federal wiretap statute. The correctness of this ruling is the principal issue on appeal. We affirm.

I.

The one-count indictment alleged that fourteen named defendants (including the seven who now appeal), one Albert Isella, and others known and unknown to the grand jury, were engaged in an illegal numbers lottery business. The government's evidence established that the operation was a major "gambling lay off" business. A "lay off" operation enables professional bookmakers to diminish risk by re-betting or "laying off" large bets with other gamblers. United States v. Box, 530 F.2d 1258, 1261 (5 Cir. 1976); United States v. Bernstein, 509 F.2d 996, 1002 n.14 (4Cir. 1975), vacated, 45 U.S.L.W. 3583 (U.S. Feb. 28, 1977) (No. 74-1486); United States v. Bobo, 477 F.2d 974 (4Cir. 1973), cert. denied sub nom., Gray v. United States, 421 U.S. 909 (1975). The proof showed that London, Genco and Isella were partners in overall control of the operation, with London as the senior partner and Genco and Isella having lesser, though substantial, interests. Himes was the clerk and record keeper for the operation. Shade, Clerkley, Cottman and Jones all owned substantial books and regularly "laid off" heavily bet numbers to the London enterprise through Himes, who performed his duties by telephone at his home.

At trial, the government relied heavily upon evidence secured through electronic surveillance. Pursuant to orders signed by Judges Harvey and Young of the district court, FBI agents installed a microphone at London's place of business and "pen register" and intercepting devices at the Himes residence.[1]

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1. A "pen register" device is used to trace telephone calls. A detailed explanation of its use is found in United States v. Caplan, 255 F.S. 805, 807 (E.D. Mich. 1966). After a substantial number of calls were traced to premises where it was reasonably knwon that numbers gambling was being conducted, the pen register was augmented by an interception device.

The affidavits supporting the applications for orders establish that London's place of business was an office where much of the business was transacted in person but that Himes apparently transacted his business from his home by telephone. Undoubtedly, this is why the agents sought and were granted authority to install a microphone in London's office so that all conversations couls be monitored while they sought only surveillance of telephone calls at the Himes' residence.

FBI agents monitored all conversations at London's office whenever any of three partners were present. Recordings were made of those conversations dealing with gambling activities. Logbooks were also maintained, indicating in almost minute-by-minute fashion the identities of persons known to be present, the nature of the conversation then occuring, and the use of recording apparatus (if any). This monitoring lasted from August 24, 1974 until September 12, 1974.

FBI agents also monitored the use of a telephone at the Himes residence. A tape recorder was activated each time an incoming or outgoing call was initiated. Agents "spot checked" each call to determine its nature. If the call dealt with gambling, monitoring continued and the call would be taped in its entirety. If the call dealt with personal matters, all monitoring and recording would cease. A second set of logbooks was maintained, indicating the time, content, and recording (or non-recording) of every call. This activity continued from September 6, 1974 until September 24, 1974.

II.

At trial, defendants moved the district court to exclude all evidence secured by wiretap. The motion was denied. Defendants contend that the evidence should have been suppressed, asserting allegedly fatal variances between government conduct and the terms of the wiretap statute.

A.

Electronic eavesdropping by law enforcement personnel is governed by the federal wiretap statute, Title III of the Omnibus Crime Control and Safe Streets Act of 1968, as amended, 18 U.S.C. § 2510, et seq. The wiretap statute was intended to make an accommodation between competing goals of crime control and protection of the right to privacy. 2

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2. Congress noted that wiretaps were needed to combat the rise of organized crime.

> Victims, complainants, or witnesses are unwilling to testify because of apathy, fear, or self-interest, and the top figures in the rackets are protected by layers of insulation and direct participation in criminal acts. Information received from paid informants is often unreliable, and a stern code of discipline inhibits the development of informants against organized criminals. In short, intercepting the communications of organized criminals is the only effective method of learning about their activities.

[1968]U.S. Code, Cong. & Ad. News, 2112, 2159. At the same time, Congress realized that unrestricted wiretapping would completely undermine traditional notions of privacy.

> The tremendous scientific and technological developments that have taken

> place in the last century have made possible today the widespread use and abuse of electronic surveillance techniques . . . . No longer is it possible, in short, for each man to retreat into his home and be left alone. Every spoken word relating to each man's personal, marital, religious, political, or commercial concerns can be intercepted by an unseen auditor and turned against the speaker to the auditor's advantage.

Id. at 2154.

A variety of controls are imposed on police action, intended to "delineat [e] on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." [1968]U.S. Code, Cong. & Ad. News 2112, 2153.

Defendants' initial contention is that the wiretap orders, signed by Judges Harvey and Young, were predicated upon an insufficient showing of need. Under the wiretap statute, intercepted wire or oral communication is rendered inadmissible in evidence unless it was intercepted in compliance with the statute. 18 U.S.C. § § 2515, 2518 (10 (a). The statute requires that the government apply for a judicial order before electronic surveillance may begin. 18 U.S.C. § 2516. In addition, the government is required to show, and the authorizing judge must find, a compelling need for this type of activity. 18 U.S.C. § § 2518 (1) (c), (3) (c). Specifically, there must be a showing that "other

investigative procedures have been tried and have failed or . . . reasonably appear to be unlikely to succeed if tried or to be too dangerous." 18 U.S.C. § 2518 (1) (c).

To meet the requirement of the statute, the government, in the instant case, produced two affidavits by FBI Special Agent John Huntley. Each affidavit began by detailing the information already known to the government, primarily through the use of informers, and the reasons why the informers were thought to be reliable. The FBI was apparently well aware of the roles played by London, Genco, Isella and Himes. In addition, the FBI knew that certain premises (London's office and Himes' residence) were being used to conduct the gambling business. However, the identities of many other participants, including most bookmakers who regularly "laid off" bets, were not known. The affidavits concluded with the following recitation:

NEED FOR INTERCEPTION

1. The confidential informants described herein have categorically refused to testify in open court for fear of their personal safety and that of their families.

. 2. Normal investigative techniques are unlikely to succeed:

(a) Without the testimony of the above-mentioned informants it would be exceedingly difficult to prove the complete nature of the current gambling operation of Robert "Fifi"

London, Albert Carmen Isella, Richard "Dick" Genco, Robert Leroy Himes, Susan Himes, Robert John Thibou, Melvin Eugene Brzostek, Orva Elerson "Lucky" Robinson, Ambrose Robinson and others as yet unknown.

(b) It is doubtful that a search warrant, if obtained and executed, would result in obtaining gambling records sufficient to show the complete nature of this gambling operation. From my experience and the experience of other Agents, I know that gambling raids and searches of gamblers and their gambling establishments have not in the past resulted in the gathering of physical or other evidence to prove all elements of the offenses. This is particularly true in regards to evidence relating to the "lay-Off" part of a gambling operation. I have found through my experience and the experience of other Special Agents who have worked on other gambling cases that gamblers frequently do not keep incriminating records. If such records have been maintained, usually gamblers, immediately prior to or during the physical search, destroy these records. Additionally, records that have been seized in past gambling cases have generally not been sufficient to establish all of the elements of said offenses because such records are difficult to interpret and many times are of no significance without more complete knowledge of the gamblers activities.

(c) There are no known witnesses who could be relied upon to truthfully testify to the violation in question.

(d) Infiltration of the gambling operation by an undercover Agent does not appear to be possible in this case but even if such infiltration were possible, it would only be at the lowest level of the operation which would not result in evidence being obtained regarding involvement of the backers and the lay-off part of the operation. Nor would such infiltration, even if possible, ever be expected to discover the full scope and extent of the operation.

(e) Calling witnesses before the Grand Jury would not result in the gathering of sufficient evidence to uncover the full scope and extent of the operation. Only those individuals integrally involved in the operation at a high level have the requisite knowledge regarding the full scope and extent of the operation. Witnesses, even if immunized, are reluctant to incriminate themselves and their close working associates. Together their testimony would require immunization and non-prosecution of those who are the principals of the operation. But, even if obtained, their testimony is not corroborated.

3. Due to the manner in which the violations are carried out, the interception of these communications is the only available method of investigation which has a reasonable likelihood of securing the evidence necessary to prove the commission of this violation.

Defendants suggest that the affidavits fall short of establishing the degree of need specified in the statute. We disagree.

The showing of need made pursuant to § 2518 (1) (c) is "to be tested in a practical and commonsense fashion." [1968]U.S. Code, Cong. & Ad. News 2112, 2190. See United States v. Armocida, 515 F.2d 29, 37-38 (3 Cir.), cert. denied, 423 U.S. 858 (1975); United States v. James, 494 F.2d 1007, 1015-16 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). Applying this test, we find that the affidavits constitute a sufficient basis from which the district court could, and did, conclude that wiretaps were essential to the success of the investigation.

Defendants urge that the affidavits are flawed in that they clearly identify four principals (i.e., London, Genco, Isella and Himes). While ample evidence may have been available to arrest and convict this foursome, the government is not precluded from carrying the investigation further. In particular, the government has a valid interest in uncovering the names and locations of various "backers", bookmakers, who regularly "lay off" bets and thereby supply the organization with capital. The situation is directly analogous to that considered by the district court in United States v. Staino, 358 F.S. 852 (E.D. Pa. 1973). In Staino, the court considered a telephone "tap" which led to the arrest and prosecution of two individuals dealing in counterfeit currency. The telephone tap was authorized by the district judge after review of an FBI affidavit. The affidavit clearly established government knowledge of defendants' role as conduits for the bogus currency. Defendants ultimately sought to suppress all wiretap evidence, alleging that the affidavits set forth

sufficient facts which could have led to their conviction. The district court rejected this argument.

Defendants argue that according to statements in the affidavit, sufficient evidence existed prior to the wiretap to convict [them]both . . . if that evidence was shown to be true. But, although it is likely that probable cause existed for these arrests, it cannot be supposed that there was the faintest reason to think that the trail ended there. By its very nature, the illegal possession of and dealing in counterfeit notes involves, in most instances, many individuals who would be liable as co-conspirators. And even though the investigative agents were able to uncover the first layer of the operation, a substantial likelihood existed that other persons were involved in the same enterprise. Plainly, normal investigative techniques had ceased to be effective once the visible members of the hierarchy, if one existed, were discovered. To suppose that the investigation should have terminated at this point is unrealistic. The men were merely the tip of the iceberg; they could always be replaced. In order to root out the offense, those who were ultimately responsible -- individuals who were the source of the counterfeit notes and who placed them into circulation - - had to be found . . .

Id. at 857. Here, it was vital for the government to uncover the source of the "lay off" bets themselves, professional bookmakers who "fueled" the operation and who would simply find replacements once the four principals were swept away.

Defendants attempt to distinguish Staino by arguing that the four principals could have led FBI agents to other participants. In particular, they point to a list of names kept by Genco and apparently known to police. They suggest that normal search and seizure or infiltration would have produced the list, which in turn would have revealed the names of all co-conspirators. This issue is directly addressed in the affidavits and the averments made therein are uncontradicted by any facts of record. The government, not unreasonably, concluded that searches in this type of case are unproductive because gambling records are habitually hidden, destroyed in police raids, or written in special code. Infiltration was also rejected as impractical. The government asserted that it sought information concerning the highest levels of the conspiracy; infiltration would be possible only with regard to the lowest levels and would be ineffective to uncover the full scope and extent of the operation. Similar declarations were accepted by this court in dealing with another "lay off" business. United States v. Bobo, 477 F. 2d 974, 983 (4 Cir. 1973), cert. denied sub nom., Gray v. United States, 421 U.S. 909 (1975). In Bobo, we concluded that statements of the kind set forth in the government's affidavits, untainted by any showing of inaccuracy or exaggeration, were sufficient to establish that searches and infiltration (among the many techniques considered) were poor substitutes for electronic surveillance.

Finally, defendants contend that the affidavits are deficient in failing to discuss and eliminate all possible alternatives to wiretapping. Defendants

specifically note that Agent Huntley fails to mention physical surveillance and observation of the four known principals. We reject this argument.

Section 2518 (1) (c) offers two alternatives to the government. It may show that traditional investigative techniques have been tried and have failed, or it may show that they are unlikely to succeed. In cases construing the first alternative, the courts have made it clear that police need not exhaust every conceivable technique before making application for a wiretap. See, e.g., United States v. Feldman, 535 F.2d 1175, 1178-79 (9 Cir.), cert. denied, 45 U.S.L.W. 3345 (U.S. November 8, 1976) (No. 76-113); United States v. Vento, 533 F.2d 838, 849 &nn. 15-16 (3 Cir. 1976); United States v. Robertson, 504 F.2d 289, 293 (5 Cir. 1974), rehearing denied, 506 F.2d 1056, cert. denied, 421 U.S. 913 (1975). We think the same logic is applicable to the second alternative; and when applied, we think that the affidavit is sufficient to demonstrate a need for the wiretap.

B.

Defendants next contend that the government violated the wiretap statute by monitoring all conversations at London's office whenever any of the three partners were present. Defendants argue that such wholesale monitoring violates the "minimization" requirement contained in the statute. We find this contention to be without merit.

The statute mandates that law enforcement personnel refrain from intercepting communications having little or no relation to the suspected offense:

> Every order authorizing a wiretap . . . shall be executed as soon as practicable, and shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception under this chapter, . . .

18 U.S.C. § 2518 (5). This provision is intended "[t]o prevent impriper invasion of the right of privacy and to curtail the indiscriminate seizure of communications, ..." United States v. Focarile, 340 F.S. 1033, 1044 (D. Md.), aff'd sub nom., United States v. Giordano, 469 F.2d 522 (4 Cir. 1972), aff'd, 416 U.S. 505 (1974). [3] We believe that the requirement has been met in the instant case.

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3. The minimization requirement, along with the rest of Title III, was drafted in response to Supreme Court deciaions in Berger v. New York, 388 U.S. 41 (1967) and Katz b. United States, 389 U.S. 347 (1967) [1968]U.S. Code, Cong. & Ad. News, 2112, 2153, 2163.

In Berger, the Supreme Court invalidated a New York eavesdropping statute as unconstitutional under the Fourth and Fourteenth Amendments. Among the statute's infirmities, the Court noted a complete failure to prevent indiscriminate wiretapping.

. The wiretap statute does not require that all innocent communications be left untouched. Congress recognized that legitimate investigations

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3. (Continued)

> [The New York statute] authorizes the "indiscriminate use" of electronic devices specifically condemned in Osborn [v. United States, 385 U.S. 323 (1966)]. "The proceeding by search warrant is a drastic one," Sgro v. United States, 287 U.S. 206, 210, 77 L ed 260, 262, 53 S. Ct. 138, 85 ALR 108 (1932), and must be carefully circumscribed so as to prevent unauthorized invasions of "the sanctity of a man's home and the privacies of life." Boyd v. United States, supra, 116 US 616 at 630, 29 L ed 746, at 751, 6 S Ct 524. New York's broadside authorization rather than being "carefully circumscribed" so as to prevent unauthorized invasions of privacy actually permits general searches by electronic devices, . . .

388 U.S. at 58. Minimization and its companion safeguards were designed to assure that

> the order [authorizing a wiretap] will link up specific person, specific offense, and specific place. Together [the provisions of Title III]are intended to meet the test of the Constitution that electronic surveillance techniques be used only under the most pre-

> cise and discriminate circumstances, which fully comply with the requirements of particularity.

S Rep No. 1097, 90th Cong., 2d Sess., 102 (1968). Bynum v. United States, cert denied, 423 U.S. 952 (1975) (Brennan, J., dissenting).

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would often uncover harmless conduct within the midst of its unlawful counterpart. Accordingly, the wiretap statute merely provides that unnecessary intrusions be minimized, or reduced to the smallest degree possible. In testing compliance with this requirement, the courts have proceeded on a case-by-case basis, invoking a standard of reasonableness. See [1968] U.S. Code, Cong. & Ad. News, 2112, 2192; United States v. Daly, 535 F.2d 434, 441 (8 Cir. 1976); United States v. Armocida, 515 F.2d 29, 42 (3 Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 873-74 (7 Cir. 1975); United States v. James, 494 F.2d 1007 1018 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). The statute is deemed to be satisfied if "on the whole the agents have shown a high regard for the right of privacy and have done all they reasonably could to avoid unnecessary intrusion." United States v. Armocida, 515 F.2d 29, 42 (3 Cir.), cert. denied, 423 U.S. 858 (1975), quoting from United States v. Tortorello, 480 F.2d 764, 784 (2 Cir.), cert. denied, 414 U.S. 866 (1973) (emphasis in the original).

In analyzing a given case, the federal courts

have considered three principal factors: (1) the nature and scope of the alleged criminal enterprise; (2) the government's reasonable expectation as to the content of, and parties to, the conversations; and (3) the degree of judicial supervision while the wiretap order is being executed. See United States v. Daly, 535 F.2d 434, 441-42 (8 Cir. 1976); United States v. Vento, 533 F.2d 838, 852-53 (3 Cir. 1976); United States v. Scott, 516 F.2d 751, 758-59 (D.C. Cir.), rehearing denied, 522 F.2d 1333 (1975), cert. denied, 425 U.S. 917 (1976); United States v. Armocida, 515 F.2d 29, 44-45 (3 Cir.), cert. denied, 423 U.S. 858 (1975); United States v. Quintana, 508 F.2d 867, 874-75 (7 Cir. 1975). When we consider each factor, we cannot conclude that the government's conduct violated the statute.

When law enforcement officials are confronted with large, far-flung and on-going criminal activity involving multiple parties, they are afforded greater latitude in conducting wiretaps. The Seventh Circuit, in considering a drug conspiracy, held that

> [l]arge and sophisticated narcotics conspiracies may justify considerably more interception than would a single criminal episode. This is especially so where, as here, the judicially approved purpose of the wiretap is not so much to incriminate the known person whose phone is tapped as to learn the identity of far-flung conspirators and to delineate the contours of the conspiracy.

United States v. Quintana, 508 F.2d 867, 874 (7 Cir. 1975). In fact, the legitimate investigation of conspiracies may necessitate the interception of all or almost all communications over a given period of time. See United States v. Chavez, 533 F.2d 491, 493-94 (9 Cir.), cert. denied, 44 U.S.L.W. 3685 (U.S. June 1, 1976) (No. 75-6685); United States v. Manfredi, 488 F.2d 588, 600 (2 Cir. 1973), cert. denied, 417 U.S. 936 (1974); United States v. Bynum, 485 F.2d 490, 500-02 (2 Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974), on remand, 386 F.S. 449 (S.D. N.Y. 1974), aff'd, 513 F.2d 533 (2 Cir.), cert. denied, 423 U.S. 952 (1975); United States v. Cox, 462 F.2d 1293, 1300-01 (8 Cir. 1972), cert. denied, 417 U.S. 918, rehearing denied, 419 U.S. 885 (1974).

Although defendants were charged with the substantive crime of illegal gambling rather than a narcotics or other type of conspiracy, the reasoning advanced in Quintana applies with equal force. The government's proof established a far-flung, continuous criminal operation involving many persons, known and unknown. The purpose of the wiretap was not to ensnare the known principals. The government was primarily (and justifiably) interested in detecting the hidden members of the "lay off" operation -- those who supported it and who could be expected to support another if only the principals were successfully prosecuted. As such, continual monitoring over a three week period did not offend the statute.

By analyzing the government's expectations, courts attempt to determine whether sufficient advance knowledge was available to tailor the

minimization efforts. Did the government know the identities of all suspects? Were police familiar with the timing or patterns of certain conversation, so as to distinguish between innocent and incriminating speech? See United States v. James, 494 F.2d 1007, 1020 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). In the instant case, FBI personnel did not know the identities of all participants in the "lay off" system. Therefore the monitoring agents could not assume that certain conversations with certain individuals would clearly be irrelevant. Additionally, the government chose to utilize electronic eavesdropping rather than a telephone tap. Telephone taps enable police to divide communications into discrete units, which can then be assessed on an individual basis. If a call is personal in nature, interception may cease, subject to resumption when another call is initiated. [4] Electronic eavesdropping does not allow this degree of selectivity. Conversation may range over many subjects, shifting instantaneously and without warning. Because of this uncertainty, we cannot say that anything less than continuous monitoring would suffice. [5]

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4. In fact, this procedure was utilized in monitoring calls at the Himes residence. As noted, supra, agents "spot checked" each call to determine its essential character. All monitoring and recording would cease if the call dealt with personal matters.

5. We also note that many of the conver sations at London's office were in code.

A third and final consideration is the degree of judicial supervision while the wiretap order is

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5. (continued)

Special codes have continually caused problems for law enforcement personnel, especially when dealing with narcotics conspiracies. See, e.g., United States v. James, 494 F.2d 1007, 1019 (D.C. Cir.) cert. denied, 419 490, 501 (2 Cir. 1973), vacated on other grounds, 417 U.S. 903 (1974), on remand, 386 F.S. 449 (S.D. N.Y. 1974), aff'd, 513 F.2d 533 (2 Cir.), cert. denied, 423 U.S. 952 (1975); United States v. Cox, 462 F.2d 1293, 1300-01 (8 Cir. 1972), cert. denied, 417 U.S. 918, rehearing denied, 419 U.S. 885 (1974); United States v. Sisca, 361 F.S. 735, 744 (S.D.N.Y. 1973), aff'd, 503 F.2d 1337 (2 Cir.), cert. denied, 419 U.S. 1008 (1974).

Federal courts have traditionally allowed a greater degree of monitoring when suspects use specialized codes or jargon. See United States v. Armocida, 515 F.2d 29, 44 (3 Cir.), cert. denied, 423 U.S. 858 (1975); United States v. James, 494 F.2d 1007, 1019 (D.C. Cir.), cert. denied, 419 U.S. 1020 (1974). But see Note, Minimization of Wire Interception: Presearch Guidelines and Postsearch Remedies, 26 Stan. L. Rev. 1411, 1419 n. 42 (1974) (suggesting that the use of codes or jargon should not be invoked to justify departure from the minimization requirement.

C.

Defendants' third and final contention deals with the use of recording equipment. Defendants argue that the government was required to record all conversations at London's office, rather than a portion dealing with alleged gambling activities. We agree, but we do not believe that in this case reversal of the convictions is warranted.

The wiretap statute provides that

> [t]he contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded on tape or wire or other comparable device. The recording of the contents of any wire or oral communication under this subsection shall be done in such way as will protect the recording from editing or other alterations.

18 U.S.C. § 2518 (8) (a). The statute does not contain discretionary language; it is an absolute command. Interceptions "shall" be recorded, if "possible."[6] As another federal court has noted, "the wiretap statute requires the recordation of intercepted communications by any means authorized by the chapter, . . ." United States v.

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6. S. Rep. 90-1097; [1968]U.S. Code, Cong. & Ad. News 2112, 2193 states that § 2518 (8) (a) requires recording if "practicable." See text infra.

Buckhanon, 374 F.S. 611, 615 (D. Minn. 1973) (emphasis in the original).[7] Here, the government has made no attempt to justify its failure. It has not demonstrated that recordation was impossible. We turn then to consideration of whether this omission required the suppression of all wiretap evidence and consequent reversal of the convictions. We hold that it does not.

The statute expressly prohibits the use at trial, and at certain other proceedings, of the contents of any intercepted wire communication or evidence derived therefrom "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. § 2515. The circumstances which require suppression under

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7. In Buckhanon, defendants, charged with possession of heroin with intent to distribute and with conspiracy to possess and distribute heroin moved to suppress certain evidence procured by electronic surveillance. One of the arguments concerned recordation of the communications intercepted. Defendants complained that the judicial order, authorizing the wiretaps, did not provide for recordation. The district court countered by noting that recordation was required under the statute and not by virtue of court order.

§ 2515 are, in turn, set out in § 2518 (10) (a):

> (i) the communication was unlawfully intercepted;
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval.

Only the first category is relevant to this case, since there is no contention that the orders were insufficient and it is manifest that the duty to record is imposed by the statute itself and not by judicial order. We must decide whether the communications introduced at trial, constituting the recorded conversations at London's office, were "unlawfully intercepted" because of the failure to record other dialogue between the co-conspirators.

Resolution of that issue depends upon three Supreme Court decisions: United States v. Donovan, 45 U.S.L.W. 4115 (U.S. January 18, 1977); United States v. Chavez, 416 U.S. 562 (1974); and United States v. Giordano, 416 U.S. 505 (1974). These decisions hold that " [not] every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful.' " United States v. Chavez, 416 U.S. 562, 574-75 (1974). Rather, suppression is required only for a "failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for

the employment of this extraordinary investigative device." United States v. Giordano, 416 U.S. at 527. In other words, the violation must substantially impinge upon Fourth Amendment values sought to be protected by Congress in restricting and rendering uniform the use of wiretaps.

The recording provision, contained in § 2518 (8) (a), was enacted to serve an evidentiary function. Congress apparently realized that testimony by monitoring agents of what they heard would be open to attack on grounds of hearsay, failure of recollection and bias. Tape recordings, on the other hand, would be the best evidence and would be almost irrefutable if their authenticity and physical integrity were guaranteed. Accordingly, intercepted communications were to be recorded, if at all possible, and introduced in their recorded form.

The legislative history of § 2518 (8) (a), though sparse, supports this view of the statute.

> Paragraph (8) [of § 2518] sets out safeguards to insure that accurate records will be kept of intercepted communications.
>
> Subparagraph (a) requires, if practicable, that the communication be recorded on tape, wire or other comparable device. The recording must be made in such a way as will protect it insofar as possible from editing or alteration. Appropriate procedures should be developed to safeguard the identity, physical integrity, and contents of the recordings to insure their admissibility in evidence.

[1968]U.S. Code, Cong. & Ad. News 2112, 2193. In United States v. Daly, 535 F. 2d 434, 442 (8 Cir. 1976), the Eighth Circuit has indicated that its view of the purpose of the statute is to ensure the admissibility of intercepted communications at trial.

In sum, we do not think that the recording provision was intended to limit the use of wiretapping so as to preserve rights of privacy. Recordation is required to insure that the product of surveillance will be received under traditional rules of evidence. There is no indication that § 2518 (8) (a) was intended to or could fulfill the same function as exhaustion of investigatory procedures, judicial authorization and review, and minimization in protecting an individual's right to privacy.[8] It follows that a failure to record, though admittedly a violation of the statute, does not lead to suppression and reversal of the convictions. This result is dictated by the decisions in Donovan, Chavez, and Giordano.

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8. In a proper case, we can visualize that, aside from protection of rights of privacy, complete recording could benefit an accused, as for example where an accused asserts that a recording of an incriminating statement was offered in evidence out of context so as to magnify its incriminating effect by omitting related mitigating statements. But, in the instant case, defendants do not allege or demonstrate that any of the recorded communications were distorted or taken out of context. While recordings

IV.

London, Jones and Cottman make an additional contention regarding the jury instructions given by the district court. We think that the charge, read as a whole, was unexceptionable and the contention warrants no extended discussion on our part.

AFFIRMED.

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8. (continued)

might be useful also to buttress a claim that minimization was not followed, such an argument is unavailing here. Because of (1) the conspiratorial nature of the offense charged; (2) the inability of monitoring agents to predict the nature of the conversations intercepted; and (3) the degree of judicial supervision involved, we have held that continual surveillance of London's office was proper. The same reasoning applies to wiretapping efforts at the Himes' residence, the only other use of electronic surveillance before us.

APPENDIX B

FACTS AND CIRCUMSTANCES OF SPECIAL AGENT JOHN D. HUNTLEY, JR., EXCISED FROM THE AFFIDAVIT

On May 25, 1974, informant number one advised Special Agent David E. Faulkner of the Baltimore, Maryland Field Office of the Federal Bureau of Investigation, who advised your affiant that as of May 25, 1974, Robert "Fifi" London, Richard "Dick" Genco, and Albert Isella are in partnership in the major numbers lay-off operation for the Baltimore area. Informant number one also advised that London has a 75 percent interest in this operation while Genco and Isella share a 25 percent interest. Informant number one learned this information through his direct conversations with Albert Isella during the prior week.

Informant number one advised your affiant on June 24, 1974, that as of that date Isella makes at least one "lay-off" call daily between 3:00 and 3:30 p.m. Isella makes this call to a numbers backer who lays-off to Isella. Informant number one also stated that as of June 24, 1974, the backers of the illegal numbers operation settle up their accounts with the lay-off people between Monday and Wednesday of each week for the previous week's work. Some of the backers appear personally at London's office in the basement of

1202 North Charles Street for the purpose of discussing the financial status of their accounts. Informant number one obtained this information from a backer involved in this operation.

Informant number one advised that on Wednesday **morning**, May 22, 1974, Richard Genco was observed by him in Robert London's office in the basement of 1202 North Charles Street and that he had learned from one of the partners involved in the illegal gambling business that Genco and London had a conversation in the office regarding settling up the previous week's "lay-off". Informant number one advised that Albert Isella advised him that as of May 22, 1974, he personally goes to London's office on Charles Street in the mornings during the first of the week to discuss with London matters that arise in relation to the "lay-off".

On July 17, 1974, informant number one advised your affiant that on July 13, 1974, the lay-off operation headed by London, Isella and Genco had incurred a substantial loss as a result of heavy wagering on the number "121" which was the winning number for the day.

Informant number one further advised that he learned from a backer who lays off to London's operation that on Monday, July 15, 1974, certain numbers backers appeared personally at London's office in the basement of 1202 North Charles Street, Baltimore, Maryland, and collected money directly from London to cover winning wagers on the number 121. Albert Isella also went to London's office at

1202 North Charles Street, Baltimore, Maryland on the morning of July 15, 1974, in order to obtain cash from London to pay other backers who do not have access to London directly. This source advised that London keeps a tally slip on his person and when one of the backers appears to settle up London takes the backer into his office in the basement of 1202 North Charles Street to discuss the lay-off.

On June 19, 1974, Special Agent Arthur S. Hamilton advised your affiant that on that date informant number two had advised that Albert Isella is currently involved in a major lay-off business for the Baltimore area with Robert "Fifi" London.

Informant number two also advised that as of June 19, 1974, Isella settles up with London for the lay-off every Monday morning between approximately 10:30 a. m. and 12 noon at London's office at 1202 North Charles Street, Baltimore, Maryland.

Informant number two is able to furnish this information as a result of his association with principals of this particular gambling operation and from having been present during one such meeting between Isella and London at 1202 North Charles Street.

Informant number three advised your affiant on May7, 1974, that Richard Genco and Robert "Fifi" London are currently conducting the major gambling "lay-off" operation for the Baltimore area. Informant number three has learned this information

through conversations with Genco during the past week regarding the "lay-off" business. Informant number three advised that as of this date an unknown male will call the individual numbers backers on a daily basis between the hours of 1:00 and 3:30 p. m. in order to accept lay-off bets. Informant number three stated that Genco will settle up with certain individual backers on Monday, Tuesday and Wednesday evenings for the previous week's lay-off bets. The settling up involves an exchange of money only and the backer is generally advised in advance what he owes or what is owed to him for the previous week's work. Informant number three further advised on May 23; 1974, that during the past week he has observed that Genco keeps a list of numbers accounts in his automobile in the event the backers question what is owed. Informant number three also advised that from his personal observations this list contained code names for at least one dozen numbers backers and that the total tally for the previous week's lay-off for that particular list was approximately $20,000.00.

Informant number three advised on June 3, 1974, that he had learned through conversations with Melvin Eugene Brzostek which occurred during May, 1974, that Brzostek is the backer of a large numbers operation handling approximately twelve writers. Informant number three advised that he had learned from Richard Genco during the same period that Brzostek is laying off to Genco.

Informant number three further stated that he knew through personal contact with Genco that Genco would contact London in order to change the track from which the winning number for the day would be determined for the day would be determined for the Baltimore area. Informant number three advised that it is the custom in the gambling community in Baltimore for this type of change to be made by the principal figure in the "lay-off" business. Informant number three also advised that he has learned through conversations during the last month with numbers backers who lay-off to Albert Isella that Isella is also a partner in the lay-off operation with London and Genco.

Informant number three advised your affiant on July 18, 1974, that Richard Genco had settled up with various backers during the first half of this month. This source further advised that he has learned from Genco that Genco, London and Isella are currently partners in the lay-off operation. This source advised that through his conversation with Genco during the past week and observations made by informant number three in London's office in the basement of 1202 North Charles Street during the past month that certain backers settle up at London's office with London personally while other backers settle up either with Genco or Isella at other locations. The source further advised that 121 had been the winning number for Saturday, July 13, 1974, and that London, Genco and Isella had taken a substantial loss on "lay-off"

from individual backers. As a result of this it had been necessary for London, Genco and Isella to get money to various backers who had "laid-off" this number to them. The source further advised that he had also been told by Genco that Melvin Eugene Brzostek continues as of this date to "lay-off" heavily bet numbers from his operation to Genco.

Informant number four advised your affiant on June 11, 1974, that he had learned through conversations with Orva Elerson "Lucky" Robinson during the past week that Robinson's numbers operation, which through personal observation of Robinson's operation he estimated to be in excess of $16,000.00 a week, was laying off to Robert "Fifi" London. This source further advised that he had learned during the past week through individuals involved in Robinson's numbers operation that "Lucky" Robinson's brother, Ambrose Robinson, is also presently involved as a backer in an illegal numbers lottery and is possibly connected with his brother "Lucky's" operation.

Special Agent John C. Bonner advised your affiant that on June 20, 1974, informant number five had advised him that Ambrose Robinson was currently the backer of a major numbers lottery operation which lays-off between $10,000.00 and $12,000.00 a week to Robert "Fifi" London. This source learned this information through conversation with one of the principals in this

operation. Informant number five advised that he had learned that on June 19, 1974, the number 210 had been the winning number and that certain backers who had laid this number off to "Fifi" had gone to London's office at 1202 North Charles Street to collect the money in order to pay off the winners.

Informant number six advised Special Agent David E. Faulkner on May 31, 1974, who advised your affiant, that through personal contact with Robert John Thibou, that Thibou is presently backing a large scale numbers operation handling between $80,000.00 and $90,000.00 in weekly wagers. Informant number six advised that Thibou is either a partner of Robert "Fifi" London or lays off to London.

Informant number six advised that Bobby Himes is presently making the lay-off telephone calls for London. Informant number six has learned this through conversations with a principal in this lay-off operation. This principal in the operation indicated to informant number six that London's lay-off business will total between $70,000.00 and $90,000.00 weekly in lay-off bets. Informant number six advised that Bobby Himes handles the lay-off work from a telephone in his home in the Pasadena, Maryland area, and is paid approximately $300.00 a week for this.

Informant number six advised Special Agent Jerry W. Bastin on June 5, 1974, that Himes is presently making the lay-off calls from his home in the Pasadena area. Informant

number six stated that when Himes was out of town his wife, Susan, would handle the lay-off calls.

Informant number three advised your affiant on June 11, 1974, that during the last week in May, 1974, the incoming calls to the backers from the lay-off office had been made by a female caller usually between the hours of 1:00 and 3:30 p.m. Informant number three advised that after this week the calls continued to be made by the male caller as before during the same time period. Informant number three stated he had overheard from Genco that the reason that the woman had been calling during the last week in May was because her husband, who usually handled the lay-off office, had been out of town during that week and she had been entrusted with handling the lay-off calls.

On June 28, 1974, informant number six advised Special Agent Jerry W. Bastin who advised your affiant that Bob Himes and his wife Susan had moved from his residence in Pasadena, Maryland to Jopps, Maryland. This move had occurred during the last week of June, 1974. Informant number six further advised that during the past week he had overheard Himes state that he was still handling the lay-off office for "Fifi" London at his new residence in Joppa, and that London had called him at this location on at least one occasion to take care of matters that related to the "lay-off" business. Himes

was overheard to state that he used the same telephone set up in Joppa as he had used in Pasadena and that the phones were still in the name of his wife Susan and that they utilized the auxiliary phone to make the daily lay-off calls to the different backers.

Informant number three advised your affiant on July 3, 1974, that he had been told by an individual who was receiving a lay-off call from Robert "Fifi" London's lay-off office that the lay-off call was currently being made by the same individual who had been making this incoming call in May. This source advised that this call continued to be made between 1:00 and 3:30 p.m. each day.

Informant number three advised your affiant on July 18, 1974, that as of this date one of the individual backers is continuing to receive the daily incoming telephone call between 1:00 and 3:30 p.m. from the lay-off office maintained by London. The individual taking the lay-off from this backer is the same caller as previously noted. The source knows of this through direct contact with the individual receiving this call.

On July 19, 1974, Special Agent John Bonner advised Special Agent Thomas A. Kelly that on this date he contacted informant number five who stated that as of July 19, 1974, conversations between Robert "Fifi" London, Richard Genco, Albert Isella and others involved in the lay-off operation occur in the basement office

of 1202 North Charles Street. He described the office space as consisting of a large room containing a counter and two desks, one usually occupied by London and the other by a secretary. The informant further advised that there is a small cubicle off to the north side of this large room containing a desk. Additionally he advised that on the far west side of the office there is a rear room generally used as a storage and toilet area. The informant advised that he has observed within the past week London conduct business with numbers backers in the large room and take individuals to the rear room when the front room is occupied by other people.

Informant number six advised Special Agent Jerry W. Bastin on July 22, 1974, who advised your affiant that while present at Robert "Fifi" London's office at 1202 North Charles Street, Baltimore, Maryland, during the past week that he had observed two Negro males come into this office and discuss lay-off with Robert London. This source further advised that from the conversation between Robert "Fifi" London and these two Negro males he was able to determine that they were either numbers backers or representatives of numbers backers and that their conversation with London involved the gambling business.

APPENDIX C

EXCERPT TAKEN FROM THE HONORABLE C. STANLEY BLAIR'S MEMORANDUM AND ORDER DENYING PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL

As the court has indicated, eavesdropping is a breed apart from the usual telephone interception. There was no way the agents in this case could have fulfilled the mandate of the warrant without fairly continuous monitoring. Necessarily they were privy to innocent conversations. To have indiscriminately recorded all of these would have been an unwarranted invasion of the defendants lawful activity.

Another relevant factor is the government's reasonable expectation about the contents of the intercepted communications. In this case, it should first be recalled that electronic eavesdropping rather than a telephone tap is involved. With a telephone tap, communications are divided into discrete units which government agents can appraise individually and if believed to be innocent, can cease intercepting. They then can resume their interception activities with the activation of their equipment by the next telephone call. This segregation of communications does not exist with electronic eavesdropping. At one point in a conversation one of the conspirators may be discussing an innocent matter with a nonconspirator and shift without warning to the government agents to discussing illicit operations with a co-conspirator. In this context government agents must be given a broader scope for interception.

APPENDIX D

EXCERPT TAKEN FROM THE GOVERNMENT'S ANSWER TO PETITIONERS' MOTION FOR JUDGMENT OF ACQUITTAL OR IN THE ALTERNATIVE MOTION FOR NEW TRIAL

In this case, as in United States v. Quintana, supra, at page 874, the purpose of the eavesdropping was not so much to incriminate the known person whose place of business was tapped as to learn the identity of the co-conspirators and to delineate both the contours and the interior workings of the conspiracy.

In an attempt to minimize the invasion of privacy upon the defendant, London, the Government did not record those conversations between Mr. London and others which were deemed to be not connected with the gambling enterprise. The defendants have contended that this practice also violated the provisions of the statute and has therefore, placed the Government on the horns of a dilemma. On one hand, they complain that minimization was not done, and on the other that the minimization technique that was utilized was improper.

Supreme Court, U. S.
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Nos. 76-1826, 76-1852, and 76-6978

In the Supreme Court of the United States

OCTOBER TERM, 1977

ROBERT R. LONDON, RUFUS JONES, and JULIUS COTTMAN, PETITIONERS

v.

UNITED STATES OF AMERICA

RICHARD JAMES GENCO, PETITIONER

v.

UNITED STATES OF AMERICA

JOHN SHADE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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INDEX

	Page
Opinion below	2
Jurisdiction	2
Questions presented	2
Statement	2
Argument	4
Conclusion	16

CITATIONS

Cases:

United States v. *Armocida*, 515 F.2d 29, certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858	10
United States v. *Brick*, 502 F.2d 219	8
United States v. *Chavez*, 416 U.S. 562	14
United States v. *Cox*, 462 F.2d 1293, certiorari denied, 417 U.S. 918	12
United States v. *Daly*, 535 F.2d 434	6, 10, 11, 13
United States v. *Donovan*, 429 U.S. 413	14, 15-16
United States v. *Doolittle*, 507 F.2d 1368, affirmed *per curiam*, 518 F.2d 500, certiorari denied, 430 U.S. 905	13
United States v. *Giordano*, 416 U.S. 505	13, 14
United States v. *Hinton*, 543 F.2d 1002, certiorari denied *sub nom. Bates* v. *United States*, 429 U.S. 1066	6, 8
United States v. *James*, 494 F.2d 1007, certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020	6, 10, 11
United States v. Kahn, 415 U.S. 143	8

Cases—Continued — Page

United States v. *Pacheco*, 489 F.2d 554, certiorari denied, 421 U.S. 909 — 6
United States v. *Principie*, 531 F.2d 1132, certiorari denied, 430 U.S. 905 — 12
United States v. *Quintana*, 508 F.2d 867 — 10
United States v. *Robertson*, 504 F.2d 289, certiorari denied, 421 U.S. 913 — 8
United States v. *Sandoval*, 550 F.2d 427, petition for certiorari pending, No. 76-6872 — 6
United States v. *Scott*, 516 F.2d 751, certiorari denied, 425 U.S. 917 — 12
United States v. *Tortorello*, 480 F.2d 764, certiorari denied, 414 U.S. 866 — 12
United States v. *Vento*, 533 F.2d 838 — 6

Statutes:

18 U.S.C. 1955 — 3, 6
Omnibus Crime Control and Safe Street Act of 1968, Title III, 18 U.S.C. 2510 *et seq.* — 3
18 U.S.C. 2515 — 13
18 U.S.C. 2518(1)(c) — 4, 8
18 U.S.C. 2518(5) — 9, 10
18 U.S.C. 2518(8)(a) — 13, 14
18 U.S.C. 2518(10)(a) — 13

Miscellaneous:

S. Rep. No. 1097, 90th Cong., 2d Sess. (1968) — 8

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ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A.1-A.22)[1] is reported at 556 F.2d 709.

JURISDICTION

The judgment of the court of appeals was entered on May 25, 1977. The petition in No. 76-1826 was filed on June 22, 1977, the petition in No. 76-6978 was filed on June 23, 1977, and the petition in No. 76-1852 was filed on June 24, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the application for authorization to conduct electronic surveillance sufficiently established that other investigative techniques had been inadequate or were unlikely to succeed.

2. Whether, in carrying out the court-authorized electronic surveillance of an extensive gambling operation in this case, the government failed to minimize the interception of irrelevant conversations.

3. Whether the failure by the government to record all the intercepted conversations required the suppression of recorded conversations introduced into evidence.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners London, Jones, and Cottman were convicted of conducting a gambling business, in violation of 18 U.S.C. 1955. Petitioners Genco and Shade were convicted of the same offense following a bench trial in the same court on stipulated facts. Each petitioner was sentenced to a term of imprisonment.[2] The court of appeals affirmed in a comprehensive opinion (Pet. App. A.1-A.22).

In brief, the evidence at each trial established that petitioners London and Genco and unindicted co-conspirator Albert Isella conducted an illegal "numbers" gambling operation, taking lay-off bets from other operators in the Baltimore area. London was the major partner of the operation, and Genco and Isella had lesser, but substantial, interests in the venture. Petitioners Jones, Shade, and Cottman regularly laid off heavily bet numbers to the London enterprise through codefendant Robert Himes, who acted as the clerk and recordkeeper for the operation (Pet. App. A.3).

The government's proof consisted primarily of evidence obtained through court-authorized electronic surveillance, pursuant to Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. 2510 *et seq.* In response to an application by the gov-

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[1] "Pet. App." refers to the appendix to the petition in No. 76-1852.

[2] Petitioner London was sentenced to five years' imprisonment; petitioner Jones was sentenced to three years' imprisonment; petitioner Cottman was sentenced to four years' imprisonment; petitioner Genco was sentenced to two years' imprisonment, all but 90 days of which was suspended, to be followed by a probationary period of three years; petitioner Shade was sentenced to one year of imprisonment.

ernment, supported by an affidavit of FBI Agent John D. Huntley, Jr. (Pet. App. A.23-A.44), District Judge Watkins authorized the installation of a pen register device on the telephone in the Himes residence on July 24, 1974. Similarly, based on applications by the government and affidavits submitted by Agent Huntley, District Judges Young and Harvey respectively issued, on August 13, 1974, and September 6, 1974, authorizations to place an electronic listening device in petitioner London's place of business and a wiretap on the Himes telephone.

ARGUMENT

1. Petitioners Genco and Shade contend (Pet. 76-1852, pp. 4-22; Pet. 76-6978, pp. 2-17) that the affidavits supporting the applications for electronic surveillance did not adequately show, as required by 18 U.S.C. 2518(1)(c), either that normal investigative techniques had been tried and had failed or that they were unlikely to succeed. Scrutiny of the agent's affidavits, however, fully supports the conclusions reached by both courts below (Pet. App. A.9) that the authorizing judges were presented with a sufficient showing that ordinary investigative methods were not adequate to discover the full scope of the gambling operation and produce evidence necessary to a successful prosecution.

The affidavits accompanying the surveillance applications stated that, after several months of investigation, government informants who were familiar with the gambling operation through conversations with

some of its principals and customers "refused to testify in open court for fear of their personal safety and that of their families" (Pet. App. A.42). Although the informants provided information on "the roles played by London, Genco, Isella, and Himes [and although] the F.B.I. knew that * * * London's office and Himes' residence * * * were being used to conduct the gambling business," the court of appeals correctly concluded that "the identities of many other participants, including most bookmakers who regularly 'laid off' bets, were not known" (Pet. App. A.6-A.7). The court thus found (*id.*, at A.9-A.11):

> While ample evidence may have been available to arrest and convict this foursome, the government is not precluded from carrying the investigation further. In particular, the government has a valid interest in uncovering the names and locations of various "backers," bookmakers who regularly "lay off" bets and thereby supply the organization with capital. * * * Here, it was vital for the government to uncover the source of the "lay off" bets themselves, professional bookmakers who "fueled" the operation and who would simply find replacements once the four principals were swept away.

The courts of appeals agree that electronic surveillance is permissible when the affidavit shows a factual basis from which the issuing judge can reasonably conclude that such surveillance is necessary to obtain evidence, not only for the successful prosecution of persons known to be involved in the activities under investigation, but for the investigation and prosecu-

tion of "satellite" actors. See, *e.g.*, *United States* v. *Sandoval*, 550 F.2d 427, 429-431 (C.A. 9), petition for certiorari pending, No. 76-6872; *United States* v. *Hinton*, 543 F.2d 1002, 1011 (C.A. 2), certiorari denied *sub nom. Bates* v. *United States*, 429 U.S. 1066; *United States* v. *Daly*, 535 F.2d 434, 438-439 (C.A. 8); *United States* v. *Vento*, 533 F.2d 838, 850 (C.A. 3); *United States* v. *James*, 494 F.2d 1007, 1016 (C.A.D.C.), certiorari denied *sub nom. Jackson* v. *United States*, 419 U.S. 1020; *United States* v. *Pacheco*, 489 F.2d 554, 565 (C.A. 5), certiorari denied, 421 U.S. 909. Moreover, the issuing judge "is vested with considerable discretion in his analysis." *United States* v. *Sandoval*, *supra*, 550 F.2d at 429.

The affidavits also described "the difficulties inherent in the use of normal law enforcement methods" in this case. See *United States* v. *Hinton*, *supra*, 543 F.2d at 1011. Agent Huntley stated that conventional searches and seizures would be of dubious value in ascertaining the scope of the gambling operation or in establishing all the elements of a violation of 18 U.S.C. 1955, inasmuch as his experience had been that gamblers frequently did not maintain incriminating records and that such records as were kept often were destroyed prior to, or indeed during, a search (Pet. App. A.42-A.43).[3] The affi-

[3] The affidavits also noted that an informant stated that an individual who was making lay-off calls maintained his records on water soluble paper (Pet. App. A.41). Furthermore, several items seized pursuant to searches of petitioners and the gambling premises consisted of records written on "flash paper" (Tr. 564, 597).

davits further noted that it was often difficult to interpret records that were discovered absent a complete understanding of the particular gambling activities involved (Pet. App. A.42-A.43).[4] Agent Huntley also stated that there were no known witnesses who would truthfully testify about the operation and that infiltration of the enterprise by a government agent would be unsuccessful in uncovering evidence regarding involvement of the backers and the lay-off betting portion of the operation because such infiltration could occur only "at the lowest level of the operation * * *" (Pet. App. A.43). Furthermore, it was shown that surveillance of petitioner London's office and Himes' residences had failed to establish anything more than the presence of some of the known participants in the scheme at these locations (see Pet. App. A.30, A.34-A.35, A.37-A.41, A.56-A.58, A.60-A.63). Finally, the affidavits described the crucial role that telephones played in the gambling operation and stated that many important meetings among the prin-

[4] Petitioners contend (Pet. 76-1852, p. 12; Pet. 76-6978, p. 8) that the government had "an immediate opportunity [through normal searches and seizures] to ascertain the identity and location of [the] backers" because of its knowledge that petitioner "Genco regularly carried on his person or in his automobile written records containing numerous backers and the balances due to them or owed by them to the conspirators." But the informant also advised Agent Huntley that this list was coded (Pet. App. A.32). The court of appeals correctly found that this factor, combined with the fact that "gambling records are habitually hidden [and] destroyed in police raids" (*id.* at A.11), supported the conclusion that searches would be unproductive (*ibid.*).

cipals themselves, as well as with some of the backers in the scheme, were held in petitioner London's office (Pet. App. A.24-A.25, A.29-A.31, A.33-A.34, A.36-A.37, A.39-A.41).

The requirements of 18 U.S.C. 2518(1)(c) are satisfied when the application and supporting affidavit, viewed in a practical and commonsense fashion (see S. Rep. No. 1097, 90th Cong., 2d Sess. 101 (1968)), sufficiently inform the issuing judge of the difficulties inherent in conventional techniques, so that he can insure that electronic surveillance will be utilized only when traditional investigative techniques will not suffice. See, *e.g.*, *United States* v. *Kahn*, 415 U.S. 143, 153 n. 12; *United States* v. *Hinton*, *supra*, 543 F.2d at 1011; *United States* v. *Robertson*, 504 F.2d 289, 293 (C.A. 5), certiorari denied, 421 U.S. 913; *United States* v. *Brick*, 502 F.2d 219, 224 (C.A. 8). The applications and affidavits here fully complied with this requirement. Nor were the interceptions here prohibited because "the entire operation could have been identified, located, and brought to an end with normal surveillance" and "by obtaining search and/or arrest warrants" (Pet. 76-1852, pp. 12-13; Pet. 76-6978, pp. 8-9). "Merely because a normal investigative technique is theoretically possible, it does not follow that it is likely" (S. Rep. No. 1097, *supra*, at 101). Congress did not intend "to preclude resort to electronic surveillance until after all other possible means of investigation have been exhausted by investigative agents." *United States* v. *Hinton*, *supra*, 543 F.2d at 1011.

2. Pursuant to the order authorizing the interception of oral communications at petitioner London's business premises, FBI agents monitored conversations at this location from August 24, 1974, through September 12, 1974. The agents intercepted conversations only when one of the three principals of the gambling operation (London, Genco, and Isella) was present, and they did not monitor any conversations of a privileged nature. With the exception of one conversation between petitioner London and an attorney, all conversations at the business premises of London were monitored whenever petitioners London and Genco or unindicted co-conspirator Isella were present. Furthermore, only those conversations which the agents believed to be pertinent to gambling were recorded, so that only approximately 20 per cent of the intercepted conversations were recorded (Pet. App. A.4; Gov. App. 69).[5]

Petitioners London, Jones, Cottman, and Genco contend (Pet. 76-1826, pp. 9-32; Pet. 76-1852, pp. 22-26) that in executing the surveillance order the monitoring agents did not adequately minimize the interception of innocent conversations and thereby violated 18 U.S.C. 2518(5). Petitioners assert that, because of this alleged violation, the evidence derived from the electronic surveillance should have been suppressed.

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[5] "Gov. App." refers to the appendix filed with the government's brief in the court of appeals.

The court of appeals correctly concluded that the government met the requirements of 18 U.S.C. 2518 (5) that "[e]very order [authorizing the interception of oral communication] * * * shall contain a provision that the authorization to intercept * * * shall be conducted in such a way as to minimize the interception of communications not otherwise subject to interception * * *." The determination whether there was minimization must be made "on a case-by-case basis, invoking a standard of reasonableness" (Pet. App. A.14). See *United States* v. *Daly*, *supra*, 535 F.2d at 441; *United States* v. *Armocida*, 515 F.2d 29, 42 (C.A. 3), certiorari denied *sub nom. Conti* v. *United States*, 423 U.S. 858; *United States* v. *Quintana*, 508 F.2d 867, 873-874 (C.A. 7). As the court of appeals noted (Pet. App. A.14), this evaluation entails a review of the totality of the circumstances surrounding the interception, with due regard given to the nature and scope of the alleged criminal enterprise under investigation, the government's reasonable expectation as to the content and character of the conversations, and the degree of judicial supervision during the period of surveillance. See also, *e.g.*, *United States* v. *Daly*, *supra*, 535 F.2d at 441-442; *United States* v. *Quintana*, *supra*, 508 F.2d at 874-875; *United States* v. *James*, *supra*, 494 F.2d at 1019-1021. These considerations support the determination by the court of appeals that the government did not violate 18 U.S.C. 2518(5).

In the first place, substantial latitude in the interception of conversations was appropriate here in view

of the size and sophistication of the criminal enterprise under investigation, especially since the purpose of the interception was to learn the identities of all the participants in the illegal undertaking, not just to confirm the involvement of known participants. See, *e.g.*, *United States* v. *Daly*, *supra*, 535 F.2d at 441; *United States* v. *James*, *supra*, 494 F.2d at 1019. As the court below observed (Pet. App. A.15-A.16):

> The government's proof established a far-flung, continuous, criminal operation involving many persons, known and unknown. The purpose of the wiretap was not to ensnare the known principals. The government was primarily (and justifiably) interested in detecting the hidden members of the "lay off" operation—those who supported it and who could be expected to support another if only the principals were successfully prosecuted.

The government was unaware of the identities of all the participants in the scheme and therefore was unable to ascertain in advance whether certain conversations would be relevant. Moreover, the conversations rapidly shifted from innocent to criminal subjects and many of them were in code. In this setting, the court below correctly determined that "anything less than continuous monitoring would [not] suffice" (Pet. App. A.16). Indeed, after a careful review of the tapes of the monitored conversations, the district court found "no broad class of innocent conversations that should not have been intercepted" (Gov. App. 75).

Finally, the authorizing judge required and reviewed periodic reports at five-day intervals during the intercept period, which reports "reflected, *inter alia*, the government's efforts at minimization" (Pet. App. A.17).

Thus, the monitoring agents were shown to have "a high regard for the right of privacy" and they did "all they reasonably could to avoid unnecessary intrusion." *United States* v. *Tortorello*, 480 F.2d 764, 784 (C.A. 2), certiorari denied, 414 U.S. 866.[6]

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[6] Because the minimization requirement was not violated, there is no occasion in this case to address the issue of the appropriate extent of suppression in the event of a violation (Pet. 76-1826, pp. 24-30; Pet. 76-1852, pp. 23-25). We note parenthetically, however, that no court of appeals has ruled that suppression of all overheard conversations is warranted when the government has failed to minimize the scope of interception. See *United States* v. *Cox*, 462 F.2d 1293, 1301-1302 (C.A. 8), certiorari denied, 417 U.S. 918; see also *United States* v. *Principie*, 531 F.2d 1132, 1139-1141 (C.A. 2), certiorari denied, 430 U.S. 905; *United States* v. *Scott*, 516 F.2d 751, 760 n. 19 (C.A. D.C.), certiorari denied, 425 U.S. 917. Moreover, as noted in *United States* v. *Cox*, *supra*, 462 F.2d at 1301:

> * * * 18 U.S.C. § 2517 manifests an intent to utilize *all* the evidence obtained by eavesdropping, and § 2517(5) expressly permits the use in court of evidence obtained by wiretap of a crime other than the crime upon which the court order was premised. Clearly Congress did not intend that evidence directly within the ambit of a lawful order should be suppressed because the officers, while awaiting the incriminating evidence, also gathered extraneous conversations. The nonincriminating evidence could be suppressed pursuant to 18 U.S.C. § 2518(10)(a), but the conversations the warrant contemplated overhearing would be admitted.

3. Petitioners next contend (Pet. 76-1852, pp. 22-26; Pet. 76-1826, pp. 17-32) that the recorded conversations introduced into evidence should have been suppressed because the government failed to record all intercepted conversations. There is no merit to this argument.

Although the decision of the monitoring agents to record only those intercepted conversations relating to gambling was a departure from the command of 18 U.S.C. 2518(8)(a) that "[t]he contents of any wire or oral communication intercepted by any means authorized by this chapter shall, if possible, be recorded * * *," the court of appeals correctly held that suppression of the intercepted evidence was not warranted (Pet. App. A.19). See *United States* v. *Daly*, *supra*, 535 F.2d at 442; *United States* v. *Doolittle*, 507 F.2d 1368 (C.A. 5), affirmed *per curiam*, 518 F.2d 500 (C.A. 5) (*en banc*), certiorari denied, 430 U.S. 905.

Title III prohibits the use at trial of the contents of any intercepted evidence "if the disclosure of that information would be in violation of this chapter." 18 U.S.C. 2515. In turn, 18 U.S.C. 2518(10)(a) provides that disclosure is unlawful if: "(i) the communication was unlawfully intercepted; (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or (iii) the interception was not made in conformity with the order of authorization or approval." See *United States* v. *Giordano*, 416 U.S. 505, 524-225.

Petitioners do not contend that the authorizing order was insufficient on its face or that the failure to record all the conversations was in derogation of the order. Their argument, rather, is that failure to record certain interceptions renders unlawful the interception of other conversations actually recorded. The court of appeals correctly rejected this contention (Pet. App. A.17-A.21).

Not every violation of the wiretap statute renders interceptions unlawful and subject to suppression. *United States* v. *Chavez*, 416 U.S. 562, 574-575. "[S]uppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigative device.'" *United States* v. *Donovan*, 429 U.S. 413, 433-434 (quoting from *United States* v. *Giordano*, 416 U.S. 505, 527).

As in *United States* v. *Donovan*, *supra*, 429 U.S. at 437, "nothing in the legislative history suggests that Congress intended [the recordation of all interceptions] to play 'a central, or even functional, role in guarding against unwarranted use of wiretapping or electronic surveillance.'" The court of appeals reviewed the legislative history of 18 U.S.C. 2518(8)(a) and concluded (Pet. App. A.20):

> The recording provision * * * was enacted to serve an evidentiary function. Congress apparently realized that testimony by monitoring agents of what they heard would be open to attack on grounds of hearsay, failure of recollection and bias. Tape recordings, on the other hand, would be the best evidence and would be almost irrefutable if their authenticity and physical integrity were guaranteed. Accordingly, intercepted communications were to be recorded, if at all possible, and introduced in their recorded form.[7]

In short "[n]othing in the structure of the Act or this legislative history suggests that incriminating conversations are 'unlawfully intercepted'" (*United*

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[7] Petitioners' claim that they were prejudiced by the failure to record all the intercepted conversations because this resulted in "an edited record" (Pet. 76-1826, p. 31; Pet. 76-1852, p. 25) is insubstantial, as they "do not allege or demonstrate that any of the recorded communications were distorted or taken out of context" (Pet. App. A.21, n. 8). Furthermore, contrary to petitioners' assertion, nonrecordation did not affect the ability of the court of appeals to review their claim of failure to minimize nonpertinent conversations (Pet. 76-1826, pp. 22-23; Pet. 76-1852, pp. 24-25). The court was aware of the method of recording by the agents and the types of conversations not recorded (Gov. App. 82-92). Moreover, if petitioners felt that they were hampered in their efforts to question the adequacy of minimization because the number, type, and duration of nonpertinent overheard communications were not evidenced by tape recordings, they could have availed themselves of the detailed logs which were maintained by the monitoring agents during the period of interception. These logs noted, almost from minute to minute, the individuals entering or leaving petitioner London's office, as well as each time the recording device was started or stopped, and they contained brief statements regarding the overheard conversation and whether or not it was being recorded (*ibid.*).

States v. *Donovan*, *supra*, 429 U.S. at 438) whenever other intercepted conversations are not recorded.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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